

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN JAMES WILSON,	)	No. C-92-3181 TEH (PR)
	)	
Petitioner,	)	ORDER GRANTING MOTION TO
	)	DISMISS; DENYING CERTIFICATE OF
v.	)	APPEALABILITY
	)	
CONNIE GIPSON, Warden,	)	
	)	(Doc. #20)
Respondent.	)	
_____	)	

Petitioner Kevin James Wilson, a California prisoner currently incarcerated at California State Prison in Corcoran, initiated this case in 1992 pro se by filing a complaint, which the Court construed as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. ##1, 2. An amended petition was dismissed without prejudice to re-filing after state judicial remedies were exhausted. Doc. #12. On February 4, 2010, Petitioner notified the Court that his state judicial remedies were exhausted and requested that his case be re-opened. Doc. #13. On April 17, 2012, the Court re-opened the case and ordered Respondent to show cause why the petition should not be granted.<sup>1</sup> Doc. #14.

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<sup>1</sup>Connie Gipson, Warden of California State Prison, Corcoran, the institution where Petitioner is presently incarcerated, is substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d).

1 Respondent has moved to dismiss the petition for failure to comply  
2 with the statute of limitations and because the claims are  
3 procedurally defaulted. Doc. #20. Petitioner has not filed an  
4 opposition. Having reviewed the papers and the underlying record,  
5 the Court GRANTS Respondent's motion to dismiss.

6 I

7 On May 1, 1979, Petitioner was convicted of first degree  
8 murder in Alameda County Superior Court and, on June 12, 1979, he  
9 was sentenced to a term of life in prison plus two years for a gun  
10 enhancement. Petition, Exh. 1 (Abstract of Judgment).  
11 Petitioner's direct appeal to the California Court of Appeal was  
12 denied in 1981 and, subsequently, his appeal to the California  
13 Supreme Court was denied.<sup>2</sup> Petition at 3. He filed a federal  
14 habeas petition asserting that his pre-trial identification was  
15 impermissibly tainted, which the district court denied on April 27,  
16 1987. Petition at 4.

17 On August 12, 1992, Petitioner initiated the present case  
18 by filing a prisoner complaint, which the Court construed to be a  
19 habeas petition. Doc. ##1, 2, 14. The Court dismissed the  
20 complaint with leave to amend so that Petitioner could file it as  
21 an amended petition, no later than October 26, 1992. Doc. ## 2, 4.  
22 On October 30, 1992, the Court noted that Petitioner had not filed  
23 an amended petition within the designated time and dismissed the  
24 case without prejudice. Doc. #5. On December 15, 1992, after the  
25 case was closed, Petitioner filed a first amended petition

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27 <sup>2</sup>In his petition, Petitioner indicates that he does not know  
28 the year his appeal to the California Supreme Court was denied. He  
also alleges that he submitted a direct appeal to the federal  
district court and does not know the date of its denial.

1 alleging:

2 (1) his two-year sentence for a gun enhancement violated his rights  
3 under the Due Process Clause and the Eighth Amendment; (2) the two-  
4 year sentence for the gun enhancement caused his "pre-board"  
5 hearing to be extended from 1984 to 1986, which extended his  
6 minimum eligibility parole date from 1985 to 1987, thus violating  
7 his rights under the Due Process Clause, the Equal Protection  
8 Clause and the Eighth Amendment; and (3) the Board of Prison Terms  
9 ("Board")<sup>3</sup> failed to award him credit for the extra two years he  
10 served for the gun enhancement, thus violating his rights under the  
11 Due Process Clause and the Eighth Amendment. Doc. #7. When the  
12 amended complaint was filed, the Court took no action because the  
13 case had been closed. Doc. # 14.

14 On January 12, 2005, Petitioner requested that the Court  
15 take action on the first amended petition. Doc. #11. In an Order  
16 dated July 27, 2005, the Court noted that Petitioner had stated in  
17 the body of his petition that the grounds for relief raised therein  
18 "were never previously presented" to the state courts and dismissed  
19 the petition without prejudice to refile after state judicial  
20 remedies had been exhausted. Doc. #12.

21 On August 29, 2005, Petitioner filed a habeas petition  
22 in the California Supreme Court asserting the same claims contained  
23 in his federal petition. Resp.'s Motion, Exh. C. On June 14,  
24 2006, the California Supreme Court summarily denied the petition  
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27 <sup>3</sup>The Board of Prison Terms was abolished effective July 1,  
28 2005, and replaced with the Board of Parole Hearings. Cal. Penal  
Code § 5075(a).



1 retroactive to cases on collateral review; or (4) the factual  
2 predicate of the claim could have been discovered through the  
3 exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). AEDPA's  
4 one-year time limit did not begin to run against any state prisoner  
5 before the date of the Act's enactment. Calderon v. United States  
6 District Court (Beeler), 128 F.3d 1283, 1287 (9th Cir. 1997),  
7 overruled in part on other grounds by Calderon v. United States  
8 District Court (Kelly), 163 F.3d 530 (9th Cir. 1998). A prisoner  
9 with a state conviction finalized before April 24, 1996, therefore,  
10 had until April 24, 1997, to file a federal habeas petition on  
11 time. Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).  
12 Time during which a properly filed application for state  
13 post-conviction or other collateral review is pending is excluded  
14 from the one-year time limit. 28 U.S.C. § 2244(d)(2).

15 B

16 In his petition, Petitioner appears to be challenging  
17 both the legality of the two-year sentence imposed by the trial  
18 court and the Board's decision not to award him credit for the two  
19 years he served. Although it is not clear from the petition when  
20 Petitioner's conviction became final, it was sometime in the early  
21 1980's. See Amended Petition at 3. Also, although the petition  
22 does not indicate the date of the challenged Board decision, it  
23 appears to be in the latter half of the 1980's. See Amended  
24 Petition at 7. Therefore, Petitioner's conviction and the Board's  
25 challenged decision became final many years before the enactment of  
26 AEDPA on April 24, 1996. Thus, Petitioner had until April 24, 1997  
27 to file his federal petition for a writ of habeas corpus. See  
28 Patterson, 251 F.3d at 1246.

1           Respondent first argues that, because Petitioner waited  
2 until 2005 to request that action be taken on the amended petition  
3 he filed in 1992, he failed to meet AEDPA's April 1997 deadline.  
4 However, Petitioner's amended petition filed in 1992 was filed  
5 before the 1997 deadline. Therefore, the amended petition was  
6 timely. That the Court was unaware that Petitioner had filed the  
7 amended petition until he filed his 2005 request for action, does  
8 not render it untimely.

9           In the alternative, Respondent argues that the statute of  
10 limitations began to run on the day Petitioner filed his request  
11 for action in 2005 and, thus, his exhausted amended petition was  
12 not filed within the one-year statute of limitations. The Court  
13 agrees.

14           In 2005, when Petitioner requested the Court to take  
15 action on his petition, his claims were admittedly unexhausted and  
16 the petition was dismissed to enable him to return to state court  
17 to exhaust his judicial remedies. See 28 U.S.C. § 2254(b), (c);  
18 Rose v. Lundy, 455 U.S. 509, 515-16 (1982); Duckworth v. Serrano,  
19 454 U.S. 1, 3 (1981); McNeeley v. Arave, 842 F.2d 230, 231 (9th  
20 Cir. 1988) (state prisoners who wish to challenge collaterally in  
21 federal habeas proceedings the fact or length of their confinement  
22 are first required to exhaust state judicial remedies by presenting  
23 the highest state court available with a fair opportunity to rule  
24 on the merits of each and every claim they seek to raise in federal  
25 court).

26           The one-year statute of limitations is tolled under  
27 § 2244(d)(2) for the "time during which a properly filed  
28 application for State post-conviction or other collateral review

1 with respect to the pertinent judgment or claim is pending." 28  
2 U.S.C. § 2244(d)(2). However, when the application for relief is  
3 no longer pending, the statute of limitations is no longer tolled.  
4 See Welch v. Carey, 350 F.3d 1079, 1082 (9th Cir. 2003) (a petition  
5 is "pending" only during one full round of collateral review in  
6 state court). "Pending" means "through the period of continuance  
7 . . . of" or "until the . . . completion of" the state habeas  
8 petition. Id. (citing Carey v. Saffold, 536 U.S. 214, 219 (2002)).  
9 This definition executes "Congress' clear intent as manifest in  
10 AEDPA to bring rational finality to the lengthy process of  
11 collateral review." Id. at 1083. The tolling statute is meant  
12 "to encourage expeditious resolution of claims and to protect the  
13 federal courts from . . . attempting to resolve old and unpreserved  
14 claims." Id.

15 In 2005, after the Court dismissed his petition without  
16 prejudice so that Petitioner could exhaust his claims, Petitioner  
17 immediately brought his federal claims in a petition to the  
18 California Supreme Court. At this time, AEDPA's one-year statute  
19 of limitations was in effect. The statute of limitations was  
20 tolled during the pendency of the petition in the California  
21 Supreme Court. However, the statute of limitations began to run  
22 again on June 14, 2006, when the California Supreme Court denied  
23 the petition. Petitioner did not return to this Court until  
24 February 4, 2010 when he filed his notification that his claims had  
25 been exhausted. Because this was almost four years after June 14,  
26 2006, when the statute of limitations began to run again,  
27 Petitioner's exhausted petition was not filed within the one-year  
28 limitations period. Thus, the petition is untimely, unless it is

1 subject to equitable tolling.

2 C

3 The Supreme Court has determined that AEDPA's statute of  
4 limitations is subject to equitable tolling in appropriate cases.  
5 Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). A petitioner is  
6 entitled to equitable tolling only if he shows "(1) that he has  
7 been pursuing his rights diligently, and (2) that some  
8 extraordinary circumstance stood in his way and prevented timely  
9 filing." Id. at 2562 (quoting Pace v. DiGuglielmo, 544 U.S. 408,  
10 418 (2005)). The diligence required to establish entitlement to  
11 equitable tolling is "reasonable diligence." Id. at 2565. The  
12 petitioner bears the burden of showing that "'extraordinary  
13 circumstances' were the cause of his untimeliness." Spitsyn v.  
14 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted).

15 Petitioner has not filed an opposition to Respondent's  
16 motion to dismiss on grounds of untimeliness nor raised an argument  
17 supporting equitable tolling in any other manner. Therefore,  
18 Petitioner has failed to carry his burden of showing that  
19 extraordinary circumstances were the cause of his untimeliness.

20 Accordingly, Respondent's motion to dismiss on the ground  
21 that Petitioner's petition is untimely is GRANTED.

22 III

23 Respondent also argues that, even if the petition is  
24 found to be timely, it must be dismissed because the claims are  
25 procedurally defaulted.

26 A federal court will not review questions of federal law  
27 decided by a state court if the decision also rests on a state law  
28 ground that is independent of the federal question and adequate to



1 support the judgment, unless the petitioner can show cause for the  
2 default and prejudice attributable thereto or demonstrate that  
3 failure to consider the federal claim will result in a fundamental  
4 miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 729-30,  
5 750 (1991).

6           The California Supreme Court's June 14, 2006 summary  
7 denial of Petitioner's petition exhausted his federal claims.  
8 However, the court's citation to In re Robbins in its denial means  
9 that it denied the petition because it was untimely. See Walker v.  
10 Martin, 131 S. Ct. 1120, 1124, 1126 (2011) (California courts'  
11 citation to Robbins, the controlling decision on timeliness of  
12 habeas petitions, signals petition is denied as untimely).  
13 California's timeliness rule has been held to be independent, see  
14 Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003), and  
15 adequate, see Walker, 131 S. Ct. at 1131, for determining whether  
16 federal habeas claims are procedurally defaulted.

17           Therefore, because the state petition was denied as  
18 untimely, Petitioner's federal claims are procedurally defaulted  
19 and not subject to habeas review unless he demonstrates cause for  
20 the default and actual prejudice or that the failure to consider  
21 his habeas claims will result in a fundamental miscarriage of  
22 justice. As mentioned previously, Petitioner has failed to file an  
23 opposition or otherwise dispute Respondent's arguments. Therefore,  
24 he has failed to show cause and prejudice or that a fundamental  
25 miscarriage of justice will result from a failure to consider his  
26 claims.

27           Accordingly, Petitioner's claims are dismissed because  
28 they are procedurally defaulted.

IV

Because Petitioner's petition is untimely and his claims are procedurally defaulted, his petition is dismissed with prejudice. Respondent's motion to dismiss is GRANTED. The Clerk shall terminate any pending motions as moot, enter judgment in favor of Respondent and close the file.

Further, a certificate of appealability is DENIED. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [or] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

IT IS SO ORDERED.

DATED 02/28/2013



THELTON E. HENDERSON  
United States District Judge

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